

BUY AMERICAN PROVISIONS

AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA)

SUMMARY OF BUY AMERICAN PROVISIONS AND GUIDANCE ISSUED BY THE U.S.
DEPARTMENT OF ENERGY (DOE) ENERGY EFFICIENCY AND RENEWABLE ENERGY (EERE)

Original Statutory Requirement (ARRA, Section 1605)

All projects funded by the American Recovery and Reinvestment Act (ARRA) for the construction, alteration, or repair of a public building or public work **must use iron, steel, and manufactured goods that are produced in the United States**. Subgrantees should retain documentation, such as a statement from the manufacturer, supplier, and/or vendor, which supports their compliance with the Buy American provisions. There are three exceptions to the Buy American provisions:

- *Nonavailability*: Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality;
- *Unreasonable cost*: Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the project by more than 25 percent;
- *Inconsistent with public interest*: Applying the Buy American restriction is inconsistent with the public interest.

Requesting a Waiver

Subgrantees may request that Buy American restrictions be waived for the exceptions listed above (nonavailability, unreasonable cost, or inconsistent with public interest). To request a Buy American waiver, Subgrantees should submit the information and supporting data listed in 2 CFR 176.140(c) and (d) to their assigned Energy Division Program Manager.

Definitions (2 CFR 176.140, 160)

Public building or public work – a building or work of a government entity. All ARRA-funded projects administered by the Energy Division of ADECA are included in this definition.

Manufactured good – a good brought to the construction site for incorporation into building or work that has been (a) processed into a specific form or shape, or (b) combined with other raw material to create a qualitatively different material. Only manufactured goods that are permanently attached to or fixed to real property are covered by the Buy American provisions.

Produced in the United States – (a) a good that is either wholly produced in the United States (the production or manufacturing facility is physically located in the United States or its territories), or (b) if it contains materials from another country, a good has been substantially transformed in the United States into a new and different manufactured good.

Categorical Waiver issued February 11, 2010

A categorical waiver has been issued for the following items due to a “nonavailability” determination based on a lack of domestic manufacturing capacity:

- Light emitting diode (LED) traffic lights, arrows, and crosswalk signals (excludes the metal or plastic fixtures, also referred to as the “housing” or “shell”);
- Fluorescent electronic lighting ballasts (with the exception of electronic dimming ballasts for fluorescent lights that are capable of operating the lamps below 50% of their rated light output); and
- Screw-in and pin-base compact fluorescent lamps (with the exception of plug-in CFLs longer than 10 inches).

Limited Public Interest Waiver issued March 19, 2010

A nationwide limited waiver has been issued for the purchase of the following items:

- Light emitting diode (LED) lighting (lamps, fixtures, and supporting components); and
- HVAC units.

This waiver *only applies* in circumstances where the Subgrantee has taken substantial steps to commit funds for the purchase of LED lights or HVAC units between **February 17, 2009, and March 31, 2010**. Substantial steps to commit funds would include, but are not limited to:

- Issuing a Request for Proposals (RFP) on or before March 31, 2010 (applicable only where the grantee accepts a proposal received under that RFP);
- Placing an order for the goods on or before March 31, 2010 (applicable in sole source selection);
- Commencing a bidding process on or before March 31, 2010.

On March 31, 2010, these limited waivers of Buy American provisions expired, with the exception of LED traffic lights, arrows, and crosswalk signals, which are covered by the categorical waiver issued on February 11, 2010.

De Minimis Public Interest Waiver issued May 24, 2010

A nationwide limited *de minimis* waiver has been issued that exempts incidental items with a value of up to 5% of total costs of the iron, steel, and manufactured goods used in and incorporated into an individual project.

Nonavailability Waiver issued May 24, 2010

A “nonavailability” waiver has been issued for the following categories of manufactured goods:

1. Programmable Thermostats – Includes devices that permit adjustment of heating or air-conditioning operations according to a pre-set schedule. Applies only to nonresidential programmable thermostat units.
2. Commercial Scale Fully – Automatic Wood Pellet Boiler System – Includes wood pellet boilers featuring a pneumatic conveyance system to transport wood pellets to the boiler, an automatic ignition system, continuously monitored and optimized combustion, ash removal/management system and the ability to control and integrate with other existing heat systems.

3. Facility and Small District Wood Pellet and Chip Boiler Furnaces – Includes high efficiency, ultra-low emission biomass boilers for facility and small district heating, ranging from 35,000 Btu – 15,000,000 Btu.
4. Variable Refrigerant Flow Zoning HVAC Systems and Inverter-Driven Ductless Mini-Split HVAC Systems – Includes variable refrigerant flow (VRF) multi-split heat pump (with or without heat recovery) and air conditioning systems; and inverter-driven ductless mini-split heat pump and air conditioner systems. This waiver includes the main condenser and heat pump units, wall and fan coil units, zone controllers, remote controls, and any other component of the larger HVAC system.
5. Electrical “Smart” Strips/Surge Protectors – Includes power strips that detect activity in the attached equipment and cut power during periods of inactivity.
6. Gas or Propane Tankless Water Heaters up to 200,000 BTUs – Does not apply to electric tankless water heaters, which are widely manufactured in the United States.
7. Fully-Enclosed Continuous Composting Systems – Includes multi-zone, continuous loading, odor and moisture controlled composter with leachate recirculation and in-situ mixing capabilities.

Buy American Guidance issued by DOE - EERE

The Agreement Between Canada and the U.S. on Government Procurement

Canadian iron, steel and manufactured goods should be treated the same as American iron, steel, and manufactured goods used in projects funded by the Recovery Act with total costs valued at or above \$7,804,000. This only applies to new procurements commenced on or after February 16, 2010 and will remain in effect until September 30, 2011 unless extended. Project costs include the value of any project funded entirely or in part by the Recovery Act. Non-ARRA funded projects that are contractually segregated from ARRA funded projects should not be included in project costs.

United States obligations under international agreements

The Buy American requirement does not apply where the materials used in the project are from a party to an international agreement. Goods and services of that party are to be treated the same as domestic goods and services. Obligations under an international trade agreement can be invoked for projects valued at or above \$7,804,000 and only for goods that are not specifically excluded from an agreement. Very few local governments are parties to an international trade agreement. A list of eligible entities that are parties to an international trade agreement and can utilize this waiver can be found at the Appendix to Subpart B of 2 CFR Part 176.

Subgrantees should practice due diligence if a manufacturer has claimed their product(s) fall under an international trade agreement. Many have issued statements of compliance that conflict with DOE guidance. If you are unsure, contact your assigned Program Manager to verify compliance prior to procurement.

Substantial Transformation Guidance issued May 24, 2010

To establish that a manufactured good has been produced in the United States, Subgrantees must determine whether or not “substantial transformation” has occurred in the U.S. There is no requirement with regard to the origin of components or subcomponents in manufactured goods used in the project, as long as the manufacturing occurs in the U.S. The domicile of the parent company, subsidiary, distributor, or supplier is not relevant for determining compliance with the Buy American provisions.

The following questions provided therein may be helpful to determine whether or not substantial transformation has occurred. It is likely that substantial transformation has occurred in the U.S. if the answer is “yes” to either (or a combination of) Question 1, 2, or 3 below:

1. Were all of the components of the good manufactured in the U.S., and were all of the components assembled into the final production in the U.S.?
2. Was there a change in character for use of the good or the components in the U.S.? (These questions are asked about the finished good as a whole, not about each individual component.)
 - a. Was there a change in the physical and/or chemical properties or characteristics designed to alter the functionality of the good?
 - b. Did the manufacturing or processing operation result in a change of a product(s) with one use into a product with a different use?
 - c. Did the manufacturing or processing operation result in the narrowing of the range of possible uses of a multi-use product?

If the answer is yes to any of 2(a), 2(b), or 2(c), then the answer to Question 2 is yes.
3. Was/were the process(es) performed in the U.S. (including but not limited to assembly) complex and meaningful?
 - a. Did the process(es) take a substantial amount of time?
 - b. Was/were the process(es) costly?
 - c. Did the process(es) require a number of different operations?
 - d. Did the process(es) require particular high level skills?
 - e. Was substantial value added in the process(es)?

If the answer is yes to at least two of 3(a), 3(b), 3(c), 3(d), or 3(e), then the answer to Question 3 is yes.